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No. 03 - 6539

IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 2003

JAY SHAWN JOHNSON, Petitioner

vs.

STATE OF CALIFORNIA, Respondent

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

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INTRODUCTION

Petitioner Jay Shawn Johnson is pleased that Respondent, the State of California, agrees with him that certiorari should be granted. Petitioner concurs with Respondent that there is a direct and continuing conflict between the California Supreme Court and the federal Court of Appeals for the Ninth Circuit on all the issues presented here. Petitioner concurs with Respondent that the conflicts presented here warrant a grant of certiorari. Such agreement does not often arise in a criminal case.

However, Respondent has understated the degree of conflict. California's position on the issues presented here is not just in direct conflict with the Ninth Circuit. It is in direct conflict with every other court in the nation, state and federal. Most important, California's position is in direct conflict with several of this Court's own decisions on the topic of racial discrimination in jury selection. Because California's position on these issues is so totally contrary to this Court and the rest of the nation, the question for this Court should not merely be whether to grant certiorari. Instead, the question should be: how, and under what conditions, to grant certiorari.

Accordingly, Petitioner respectfully requests that this Court grant certiorari and summarily reverse the California decision, because it directly flauts one of the basic principles of Batson v. Kentucky, 476 U. S. 79, 92-92 (1986), namely, that a prima facie case of racial discrimination is established whenever there is a reasonable "inference" of discrimination. Further, and in the alternative, as to the comparative juror analysis issue, Petitioner respectfully requests that this Court grant certiorari, vacate the state court decision, remand ("GVR"), and direct the California Supreme Court to consider in the first instance the question of whether the prosecutor's supposed reasons for his challenges stand up to comparative juror analysis as applied by this Court in Miller-El v. Cockrell, 537 U.S. 322 (2003).

I.

CERTIORARI SHOULD BE GRANTED TO PREVENT THE CALIFORNIA SUPREME COURT FROM IMPROPERLY ELEVATING THE THRESHOLD FOR A PRIMA FACIE CASE OF RACIAL DISCRIMINATION IN JURY SELECTION FROM A SHOWING OF AN "INFERENCE" OF DISCRIMINATION, AS PROVIDED IN BATSON, TO A SHOWING THAT DISCRIMINATION IS "MORE LIKELY THAN NOT"

Respondent does not deny or address, and implicitly concedes, the following contentions in the Petition for Writ of Certiorari:

1) There is no decision, either from this Court, or from any of the 12 federal circuits, which has elevated the threshold for a prima facie case of racial discrimination in jury selection as high as California has elevated it, namely, to a requirement that the opponent of the strike must prove that it is "more likely than not" that the strike is race-based, before the prosecutor is required to state reasons for his challenges. California stands alone on this point.

2) California's "more likely than not" standard is different than any other court's interpretation of the test articulated by this court in Batson v. Kentucky, 476 U. S. 79 (1986), namely, that a prima facie case is established when there is an "inference" of discrimination, id., 476 U. S. at 92-93. In the same way, California's elevated standard is totally different than the test utilized by the federal circuits, which utilize this Court's "inference" standard, and which interpret the required inference to be a permissive inference. (See Petition, pp. 13-14, discussing decisions from the various federal courts. Respondent conspicuously fails to discuss any of these cases.)

3) There is no jurisdiction, other than California, which claims that peremptory challenges to all three out of three black jurors, leaving no blacks on the jury (especially in a case in which a black defendant is accused of killing his white girlfriend's child), does not even present a prima facie Batson case, but, instead is no more than mere "happenstance." People v. Johnson (2003) 30 Cal. 4th 1302, 1327.

Respondent's sole argument on this issue is to suggest that this Court has somehow, sub silentio, elevated the threshold for a prima facie case of racial discrimination under Batson to the level of proof needed by a plaintiff for a prima facie case of employment discrimination in a Title VII case, which level of proof is "more likely than not." (Respondent's brief in support of Petition for Writ of Certiorari (Respondent's brief in support), p. 7) Respondent is incorrect for two separate sets of reasons stated at pp. 12-15 of the Petition for Writ of Certiorari.

First, Respondent's position is totally contrary to the three-step test articulated by this Court in Purkett v. Elem, 514 U. S. 765, 767 (1995) for evaluating Batson challenges. Respondent's position would impose at the first step of Batson analysis, namely, the prima facie case analysis, the test which, under Purkett v. Elem, is to be applied at the third and final step of Batson analysis, namely determining whether the objector to the challenge has met his burden of proof that purposeful racial discrimination was more likely than not. California's conflation of steps one and three of Batson analysis is improper under Purkett v. Elem, just as the conflation of steps two and three of Batson analysis was held improper in Purkett v. Elam. Respondent's brief conspicuously fails to address Purkett v. Elem. That omission is fatal to its position.

Second, Respondent's position wholly ignores the fact that, when a plaintiff in a Title VII case presents a prima facie case, the burden of proof shifts, and the plaintiff will prevail unless contrary evidence is presented. See, e.g., St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993). In a Batson case, to the contrary, even when a prima facie case is presented, the burden of proof does not shift, and the objector to a peremptory challenge may lose, even if no additional evidence is presented. Purkett v. Elem, supra, 514 U.S. at 768. Thus, the level of proof needed for a prima facie Batson case is far less than that needed for a prima facie Title VII case, both (a) because Batson requires only an "inference" of discrimination, and (b) because a greater quantum of evidence is needed to win a case, such as a Title VII case, than is needed merely to shift the burden of production on a pre-trial issue, so to require a prosecutor to state his reasons for his

challenges. Indeed, Purkett v. Elam, supra, 514 U.S. at 768, contrasts on this very ground the Title VII prima facie test employed in St. Mary's Honor Center v. Hicks, supra.

Finally, on both issues presented in this case, Respondent suggests that the only conflict is between the California Supreme Court and the Ninth Circuit, and Respondent urges that this Court grant certiorari in order to bring the supposedly disfavored Ninth Circuit into line. (Respondent's brief in support, pp. 5-10, 12-13) Respondent understates the conflict. California is not just out of step with the Ninth Circuit. It is out of step with each and every one of the 12 federal circuits, and with state courts as well. The Petition cites approximately 20 cases variously arising from each of the other 11 federal circuits, all of which support the Ninth Circuit on all the issues presented here. Respondent conspicuously fails to address even a single such case.

One of the best examples of how California is out of step with the entire federal system, and with the entire nation, comes from the Eleventh Circuit. In King v. Moore, 196 F.3d 1327 (11th Cir. 1999) the Florida state trial court had found no prima facie showing of discrimination in the exercise of peremptory challenges, applying an earlier Florida case, Neil v. State (Fla. 1984) 457 So.2d 481, that anticipated Batson by two years. Like California, this earlier Florida case (Neil) required the opponent of a peremptory strike to show a "strong likelihood" of discrimination at the prima facie stage. Id., at 1331. The Eleventh Circuit found this earlier Florida standard improper. The Eleventh Circuit held that "*Neil's* standard for a prima facie case, however, is higher than *Batson*'s: *Neil* requires the party opposing a strike to point to facts establishing a "strong likelihood" that the strike had racial motives. *Batson*, on the other hand, requires the party merely to raise an inference of improper motive." Id., at 1334. Therefore, the Eleventh Circuit required that the state court determination applying the "strong likelihood" standard be re-examined under the "the more relaxed standard in *Batson*."

Ibid.[1]

Because California is wholly out of step with this Court's decisions in Batson and Purkett v. Elem, and totally out of step with the entire nation on these points, and because this issue is so clear, Petitioner submits that certiorari, followed by summary reversal, should be granted on this issue.

[1]Shortly after Batson was decided, the Florida Supreme Court revisited the "strong likelihood" test adopted in Neil to assess its compatibility with Batson. Although that court did not expressly overrule Neil, in State v. Slappy (Fla. 1988) 522 So.2d 18, 20-21, the Florida Supreme Court substantially relaxed its definition of the prima facie standard to bring it in line with Batson:

> We affirm that the spirit and intent of Neil was not to obscure the issue in procedural rules governing the shifting burdens of proof, but to provide leeway in allowing parties to make a prima facie showing that a "likelihood" of discrimination exists. Only in this way can we have a full airing of the reasons behind a peremptory strike, which is the crucial question. Recognizing, as did *Batson*, that peremptory challenges "permit those to discriminate who are of a mind to discriminate," [*Batson*,] 476 U.S. at 96, 106 S.Ct. at 1723, we hold that any doubt as to whether the complaining party has met its initial burden should be resolved in that party's favor. If we are to err at all, it must be in the way least likely to allow discrimination.
>
> – State v. Slappy, supra, 522 So.2d at 22.

Accord: Bryant v. State (Fla. 1990) 565 So.2d 1298, 1300 (holding that "any doubts as to the existence of a 'likelihood' of impermissible bias must be resolved in the objecting party's favor").

II.

CERTIORARI SHOULD BE GRANTED TO PREVENT THE CALIFORNIA SUPREME COURT FROM FLAUTING THE RULE, MOST RECENTLY ENUNCIATED IN MILLER-EL V. COCKRELL, THAT UNDER COMPARATIVE JUROR ANALYSIS, A PROSECUTOR'S SUPPOSED REASONS FOR CHALLENGING A MINORITY JUROR MAY BE DEEMED PRETEXTUAL, IF THOSE REASONS EQUALLY APPLY TO WHITE JURORS WHOM HE ACCEPTED

Respondent does not deny, or address, and thus implicitly concedes, the following contentions in the Petition for Writ of Certiorari.

1. Every federal circuit court, as well as this Court in Miller-El v. Cockrell, utilizes comparative juror analysis as a matter of course.

2. There is no court in the country, state or federal, except California, which refuses to employ the universally accepted analytical tool of comparative juror analysis at each and every stage of a Batson motion to help determine whether supposed reasons for challenging minority jurors are pretextual. California stands alone on this point.

3. No one has ever suggested any race-neutral reason in this case, and Respondent suggests none here, which would stand up to comparative juror analysis, as to why the prosecutor peremptied black potential jurors Clodette Turner and Sara Edwards.[2]

4. Miller-El v. Cockrell retroactively applies to a case such as this which was pending on direct appeal when Miller-El was decided.

There is nothing unusual when an appellate court applies comparative juror analysis. It is an ordinary tool of appellate review. When an appellate court examines the record and compares answers given by rejected minority jurors with answers given by accepted white jurors, it merely does what all appellate courts do on a daily basis, namely, determine whether the trial court's findings are supported by sufficient evidence on the record as a whole. Thus, California's prohibition of this category of judicial review in

[2]Respondent complains that the prosecutor "never had occasion" to state reasons for his challenges. (Respondent's brief in support, p. 8) That statement is incorrect. As noted at Petition, p. 3, the prosecutor was offered an opportunity to give reasons for his challenges but declined to do so.

Batson cases not only violates Batson itself, but it also violates a defendant's 14th Amendment right to due process on a state court appeal. See, e.g., Griffin v. Illinois, 351 U.S. 12, 100 L.Ed. 891 (1956).

Respondent makes one sole argument on this point. It asserts that comparative juror analysis should not be utilized on appeal when the trial court itself failed to apply comparative juror analysis at trial. (Respondent's brief in support, pp. 11-14) Respondent's argument is poorly taken for two reasons.

First, Respondent's argument violates the rule that new U.S. Supreme Court decisions, such as Miller-El v. Cockrell, retroactively apply to cases pending on direct appeal. Griffith v. Kentucky, 479 U.S. 314 (1987). Griffith provides no exception for cases, such as this one, which were tried before the new rule was announced.

Second, Respondent's argument is based upon a wholly-false premise, namely, that the state trial court would have applied comparative juror analysis, if only trial defense counsel had asked. (Respondent's brief in support, pp. 11-13 and fn. 2) This misstates California law. Ever since 1989, California has barred the use of comparative juror analysis both at trial and on appeal. People v. (James) Johnson (1989) 47 Cal. 3d 1194 [258 Cal.Rptr. 569, 767 P.2d 1047] (another Johnson case); People v. Arias (1996) 13 Cal.4th 92, 136 [51 Cal.Rptr.2d 770, 913 P.2d 980]. As the California Supreme Court held in People v. Arias, 13 Cal.4th at 136, n. 16:

> Just as an appellate court will not compare the responses of rejected and accepted jurors to determine the bona fides of the justifications offered, so the trial court itself has no obligation to perform such an analysis. "[W]e fail to see how a trial judge can reasonably be expected to make such detailed comparison mid-trial." (*People* v. [*James*] *Johnson*, *supra*, 47 Cal.3d 1194, 1220.) Moreover, as we have indicated, such an analysis is largely beside the point, . . .

Further, in a case decided just two months after the instant Johnson case, the California Supreme Court continued to hold, totally contrary to Miller-El, that comparative juror analysis may not be employed at any time, including at trial. In People v. Reynoso (2003) 31 Cal.4th 903 [3 Cal.Rptr.3d 769, 74 P.3d 852] that court once again held that it is

> unreasonabl[e] [to] expect[ ] trial judges to make "detailed comparisons mid-trial" of a prosecutor's "stated reasons for challenged excusals with similar characteristics of nonmembers of the group who were not challenged by the prosecutor." (Id., 31 Cal.4th at 320, 3 Cal.Rptr.3d at 863)

Thus, the claim by the California Supreme Court that comparative juror analysis may not be used on appeal here, simply because it was not used at trial, is totally false logic, and is a classic example of a "Catch 22." It is a "Catch 22" because it imposes an impossible-to-meet pre-condition, namely, the requirement that comparative juror analysis be first used at trial before it can be used on appeal.[3] This is an impossible to meet pre-condition for cases tried before Miller-El, because at all times prior to Miller-El, California prohibited comparative juror analysis from being used at trial. People v. (James) Johnson, supra; People v. Arias, supra.

For all these reasons, California's refusal to apply comparative juror analysis violates this Court's ruling in Miller-El.

Accordingly, Petitioner prays that this Court grant certiorari on all issues presented; that it issue a summary reversal because the California decision violates the rule of Batson that the standard for a prima facie case is an "inference" of discrimination; and/or that this Court issue a grant-vacate-remand order ("GVR") which directs the

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[3]In the now classic World War II novel *Catch 22* by Joseph Heller, Army Air Corps pilot Yossarian tries to avoid flying further missions. The only legal ground for avoiding such missions is mental illness. When he is sent to the military psychiatrist, he asserts that he is mentally ill, because he is anxious and terrified of flying and being shot down. Aha, says the military psychiatrist, that is proof of excellent mental health, because all sane fliers would be anxious and scared, and only a crazy man would want to fly more bombing missions. Because Yossarian is terrified, he is deemed sane, and his request for discharge is denied. The military rule which leads to this result is called "Catch 22." Any similarly impossible-to-satisfy prerequisite has also come to be known as a "Catch 22."

California Supreme Court to employ comparative juror analysis, as provided in Miller-El v. Cockrell.

DATED: November 3, 2003

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Stephen B. Bedrick, a member of the Bar of this Court, hereby certify that on November 4, 2003 a copy of the Reply Memorandum of Points and Authorities in Support of Petition for Writ of Certiorari in the above-entitled case was mailed, first class postage prepaid, to: Seth Schalit, Deputy Attorney General, State of California, 455 Golden Gate Avenue, Suite 11000, San Francisco, California 94102; District Attorney, Contra Costa Co. Courthouse, 725 Court Street, P. O. Box 760, Martinez, CA 94553; Clerk, California Supreme Court, 350 McAllister Street, San Francisco, California 94102; Clerk, California Court of Appeal, First Appellate District, Division Two, 350 McAllister Street, San Francisco, California 94102; Clerk, Superior Court, Contra Costa County, P. O. Box 911, Martinez, CA 94553; Ana Ramirez Palmer, Warden, California Medical Facility, P. O. Box 2000, Vacaville, CA 95696, Mr. Jay S. Johnson, K-34887, California State Prison, Solano, P. O. Box 4000, Vacaville, CA 95696. All parties required to be served have been served.

November 4, 2003

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